86-647

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1986

No.

ANTHONY LEONARD CUSENZA

v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE SEVENTH CIRCUIT

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Question Presented

Whether a criminal defendant who has timely filed a Petition for modification of sentence under Federal Rule of Criminal Procedure 35 may be denied relief solely because of the inaction of the District Court to whom the petition is directed.

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APPENDIX A: Opinions of U.S. Court of Appeals, 7th Cir. of April 9, 1986

TABLE OF AUTHORITIES

United States v. Cusenza 749 F.2d 473 (7th Cir. 1984)

United States V. Addonizio 422 U.S. 178 (1979)

United States v. Demier 671 F. 2d 1200 (8th Cir. 1982)

United States v. Kajevic 711 F.2d 767 (7th Cir. 1983)

United States v. Stollings 516 F.2d 1287 (4th Cir. 1975)

United States v. United States District Court 509 F.2d 1352 (9th Cir. 1975)

Caertner v. United States 763 F2d 787 (7th Cir. 1975)

Logan v. Zimmerman Brush Co. 455 U.S. 422 (1982)

STATUTES

Federal Rule of Criminal Procedure

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is unreported and attached hereto in Appendix A.

Jurisdiction

The jurisdiction of the Supreme Court is invoked under 28 U.S.C. 1254 (1) and Supreme Court Rule 17.1(a), which permits Supreme Court review of final judgments on petition for writ of certiorari in cases where a federal court of appeals has rendered a decision in

conflict with another court of appeals. The judgment by the Court of Appeals, Seventh Circuit which is sought to be reviewed by the petition for writ of certiorari was rendered on April 9, 1986.

Statutory Provisions Involved

The case involves the interpretation of former Federal Rule of Criminal Procedure 35, which provides in pertinent part:

> "The court may reduce a sentence within 120 days after the sentence is imposed, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after the entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction."

Said Rule 35 was amended, effective August 1, 1985, as follows:

> "A motion to reduce a sentence may be made or the court may reduce a sentence without motion, within 120 days after the sentence is modified or probation is revoked, or within 120 days

after receipt by the Court of Mandate issue upon affirmance of the judgment...The court shall determine the motion within a reasonable time."

Further involved in this petition is the due process provision of the United States Constitution forbidding the deprivation of life or liberty without due process of Law.

STATEMENT OF CASE

Petitioner was charged in a 15 count indictment before the United States District Court for the Southern District of Illinois, with participation in a conspiracy to purchase and distribute marijuana. Jurisdiction was asserted by the District Court under 21 U.S.C. Section 846. On August 1, 1983, Petitioner pled guilty to conspiracy and associated substantive counts and on September 30, 1983 Petitioner was sentenced to twelve years imprisonment.

On October 11, 1983, Petitioner appealed both the conviction and sentence, asserting that the guilty plea was invalid for failure to comply with Rule 11(C)(1) of the Federal Rule of Criminal Procedure. Petitioner further asserted that the sentencing heaving violated his due process right because he had no notice that the U.S. Attorney intended to call a surprise witness and had no time to prepare meaningful rebuttal. These claims were rejected in United States v. Cusenza 749 F.2d 473 (7th Cir. 1984) The District Court received the mandate affirming its Judgement on January 2, 1985.

Almost a year before the mandate came down, on January 4, 1984 Petitioner filed a motion to reduce or reclassify sentence under Rule 35 of the Federal Rules of Criminal Procedure. The motion was held in abeyance pending Petitioner's

Appeal. After receiving the mandate of affirmance, the district court held a hearing on the Rule 35 motion and denied the motion 173 days after receipt of the mandate.

Petitioner appealed the denial of his Rule 35 motion, on the grounds that his sentence was unreasonably disparate as against the three and seven years sentences meted out to his co-defendants; was the result of a biased and emotional state of mind on the part of the sentencing Court, and that the denial of his Rule 35 motion was without justification on the record. On appeal, Petitioner's contentions were denied on the sole ground that the ruling on his motion was beyond the 120 day period in former Rule 35, and thus beyond the jurisdiction of the District Court, leaving the Appellate Court with no power of review.

ARGUMENT AND REASONS FORGRANTING WRIT

I

Certiorari Should Be Granted To Resolve Conflicts In Priniciple Amoung Lower Courts

The denial of Petitioner's right of review as to a Rule 35 Motion resulted from an interpretation of former Rule 35 which demands that the District Court act upon a Rule 35 Motion within the 120 day period. The Seventh Circuit's rule in this area runs contrary to that of numerous other circuits, which hold that the trial court impliedly is empowered to act upon a Rule 35 Motion in a reasonable time beyond the 120 day period, so long as the motion itself was timely filed. See United States v. Stollings 516 F.2d 1287 (4th Cir. 1975).

United States v. U.S. District Court 509 F.2d 1352 (9th Cir. 1975).

Diggs v. United States 740 F.2d 239 (3rd Cir. 1984).

United States v. Demier 671 F.2d 1200 (8th Cir. 1982).

The denial of Petitioner's right of review as to his Rule 35 Motion was based upon the Seventh Circuit ruling in United States v. Kajevic 711 F.2d 767 (7th Cir. 1983). This case in turn derived its ruling from this Court's ruling in United States v. Addonizio 442 U.S. 178 (1979) where the court stated:

> "Federal Rule Crim. Proc. 35 now authorizes District Courts to reduce a Sentence within 120 days after it is imposed or after it has been affirmed on appeal. The time period, however, is jurisdictional and may not be extended."

The conflict between Circuits as to the interpretation of Addonizio revolved around the meaning to be given the above dictum respecting the rule of "reasonable time" to rule. Indeed the Notes of the

Advisory Committee on Rules respecting the amendment of Rule 35 states that the specific addition of language on "reasonable time" was done ..."to remove any doubt which might arise from dictum in some cases...", to wit, Addonizio and Kajevic, supra.

With the advent of the amendment to Rule 35, this court has not had occasion to resolve the conflicting interpretations of the prior rule. It is clear, however, that the Petitioner has been denied appellate review of his Rule 35 motion, on the basis of an interpretive rule which has been soundly rejected by a majority of circuits, and has been expressly repudiated in the 1985 amendment to Rule 35.

II

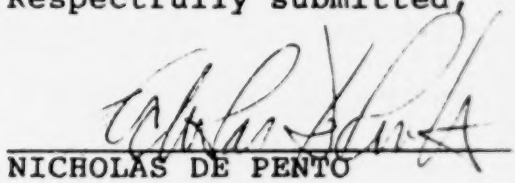
THE MINORITY INTERPRETATIONS OF FORMER RULE 35 DENIES DUE PROCESS AND FUNDAMENTAL CONCEPTS OF FAIRNESS

The interpretation of former Rule 35 promulgated by the 7th Circuit in Kajevic, supra, and in Gaertner v. United States 763 F.2d 787 (7th Cir. 1985) was cited against this Petitioner as a rule of law flatly denying him appellate review of the Rule 35 decision of the District Court. In fact, both the Kajevic and Gaertner opinions offer their rationale as reflections of the Appellate Court's doubt as to the validity of the "reasonable time" rule and were simply bases to assert that ..."those with authority to amend the rule should do so." Gaertner, supra, at 795. Despite the numerous purported bases for the 7th Circuit's rule of strict construction,

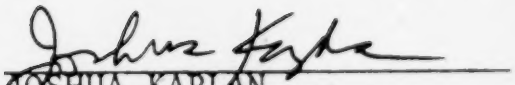
the fact remains that Petitioner is suffering under a "rule" of law which denies him procedural protections, not because of failure to act in a timely manner, but because the Court fails to act. Petitioner and those similarly situated, have no power or mechanism to force a district court to act upon a motion timely filed Petitioner respectfully submits that this state of affairs constitutes a denial of due process in that, as this Court noted in Logan v. Zimmerman Brush Co. 455 U.S. 422 (1982) at 434: ..."A system or procedure that deprives persons of their claims in a random manner... presents an unjustifiably high risk that meritorious claims will be terminated". It cannot be doubted that defendants coming under the 7th Circuit rule are subjected thereby to arbitrary and capricious happenstance with respect to their criminal procedural

rights, and there remains no justifiable Governmental purpose for such a treatment of their fundamental rights. For all of these reasons, Petitioner prays the Court for issuance of its Writ of Certiorari with report to the denial of Petitioner's appeal.

Respectfully submitted,



NICHOLAS DE PENTO



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CERTIFICATE OF SERVICE

I, NICHOLAS DE PENTO, Attorney for Petitioner herein, hereby certify that on June 9, 1986, I served three copies of the foregoing Petition for Writ of Certiorari on each of the parties herein as follows:

On Respondent, United States, by depositing such copies in the United States Post Office, San Diego, California, with First Class postage prepaid, properly addressed to the Office of the Solicitor General, Department of Justice, Washington D.C., 20530.

All parties to be served have been served.

Date: June 9, 86

NICHOLAS DE PENTO
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JUDGMENT-WITHOUT ORAL ARGUMENT

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

Before

Hon. RICHARD A. POSNER, Circuit Judge

Hon. JOHN L. COFFEY, Circuit Judge

Hon. KENNETH F. RIPPLE, Circuit Judge

UNITED STATES OF AMERICA, Plaintiff-Appellee, No. 85-2207 vs. ANTHONY LEONARD CUSENZA, Defendant-Appellant.	Appeal from the United States District Court for the Southern Dis-rict of Illinois, East St. Louis Div. NO. 83CR30026 Judge William Beatty

This cause came before the Court for decision on the record from the United States District Court for the Southern District of Illinois, E. St. Louis Division.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of said District Court in this cause appealed from

be, and the same is hereby, VACATED, and the case is REMANDED, with instructions, in accordance with the order of the Court entered this date.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

Submitted February 12, 1986 *

April 9, 1986

BEFORE

Hon. RICHARD A. POSNER, Circuit Judge

Hon. JOHN L. COFFEY, Circuit Judge

Hon. KENNETH F. RIPPLE, Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 85-2207 vs.

ANTHONY LEONARD CUSENZA,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Illinois East St. Louis Division
No. 83 CR 30026

Hon. Wiliam L. Beatty, Judge

ORDER

This is an appeal by the defendant, Anthony Cusenza, from the denial of his Rule 35(b) and 18 U.S.C. § 4205(b)(2) motion for the reduction or reclassification of his sentence. Because

* After preliminary examination of the briefs, the court notified the parties that it had tentatively concluded that oral argument would not be helpful to the court in this case. The notice provided that any party might file a "Statement as to Need of Oral Argument." See Rule 34(a), Fed. R. App. P.; Circuit Rule 14(f). Appellant responded agreeing that the matter could be decided without oral argument. Therefore, the appeal has been submitted on the briefs and record.

the district court was without jurisdiction to rule on the motion, we vacate the judgment and remand to the district court to dismiss the motion for want of jurisdiction.

I.

Cusenza was charged, along with James Strader and Christopher Goodson,[I] in a fifteen count indictment, for his participation in a conspiracy to purchase and distribute marijuana. On August 1, 1983, Cusenza pled guilty to one count of conspiracy to possess with intent to distribute a quantity of marijuana in excess of one thousand pounds, 21 U.S.C. § 1952(a)(3), and one count of unlawful use of communication facility, 21 U.S.C. § 843(b). On September 30, 1983, the defendant was sentenced to twelve years imprisonment.

On October 11, 1983, Cusenza appealed both the convictions and the sentences claiming that the quilty plea was invalid because the district court did not comply with Rule 11(c)(1) of the

Federal Rules of Criminal Procedure. He also asserted that the sentencing hearing violated his due process rights because he had not notice that the United States Attorney intended to call a surprise witness and, therefore, no time to prepare meaningful rebuttle testimony. This court rejected both claims and affirmed the United States v. Cusenza, 749 F.2d 473 (7th Cir. 1984). The district court received the mandate affirming the district court judgment on January 2, 1985.

Almost a year before the district court received our mandate, on January 4, 1984, Cusenza filed a Rule 35(b) motion for the reduction of his sentence or in the alternative for a reclassification of sentence pursuant to 18 U.S.C. § 4205(b)(2). The motion was held in abeyance pending Cusenza's appeal. After receiving the mandate of affirmance from this court, the district court held a hearing on the

Rule 35 motion. At the hearing, the defendant argued that the disparity of sentences between co-defendants, the district judge's state of mind in sentencing, and the hardship to his family as a result of his incarceration required a reduction or reclassification of his sentence. The government disagreed and also took the position that the district court was without jurisdiction to rule on the motion. The district court entered an order on June 24, 1985, denying the motion on its merits. The order was docketed on June 25. Cusenza filed his notice of appeal on July 8, 1985.

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1 James Strader and Christopher Goodson each pled guilty to one count of conspiracy to possess with intent to distribute in excess of 1,000 pounds of marijuana, one count of traveling in interstate commerce to further an illegal activity, and one count of unlawful use of a

a communication facility. On September 16, 1983 Strader was sentenced to three years' imprisonment. On June 24, 1983, Goodson was sentenced to seven years' imprisonment.

II

The government argued initially that this court has no jurisdiction because the notice of appeal was untimely. Appellant has not responded to this argument. Rule 4(b) of the Federal rules of Appellate Procedure sets a limit of ten days in a criminal case, from the entry of the judgment or order appealed from, in which to file notice of appeal. Although appellant filed his notice of appeal thirteen days after the entry of the district court order, the district court granted a motion to extend the time for filing the notice of appeal. See Fed. R. App. P.4(b); United States v. Roberts, 749 F.2d 404, 407 (7th Cir. 1984), Cert. Denied, 105 S. Ct. 1770 (1985).

Thus, we have jurisdiction over this appeal.

III

The government next contends that this court cannot reach the merits of this appeal because the district court lacked jurisdiction when it denied defendant's Rule 35 motion 173 days after receiving the mandate of affirmance from this court. Again, appellant has not responded to this contention. Nevertheless, we agree with the government. The version of Rule 35 in effect until August 1, 1985, by its terms, provides that a district court may reduce a sentence within 120 days. Gaertner v. United States, 763 F.2d 737, 797 (7th Cir.), cert. denied, 106 S. Ct. 535 (1985). The 120 day limit may not be extended at the discretion of the district court. United States v. Kajevic, 711 F.2d 767, 770 (7th Cir. 1983), cert. denied, 464 U.S. 1047 (1984). A motion for sentence modification under 18 U.S.C. § 4205(b)(2) is also governed by Rule 35. See

United States v. Inendino, 655 F.2d 108, 110 n.15 (7th Cir. 1981). Thus, the district court's power to act on Cusenza's motion had expired when it denied defendant's motion 173 days after receiving the mandate of affirmance.[2]

Accordinly, the judgment is vacated and the case is remanded with instructions to dismiss the motion under Rule 35(b) and 18 U.S.C. § 4205(b)(2) for want of jurisdiction.

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[2] A revision to Rule 35(b), effective August 1, 1985, states that if the defendant filed a motion within 120 days after receipt of a mandate of affirmance, the court may decide the motion within a "reasonable time." But this amendment is not retroactive and should be applied only to decisions a district court makes after August 1, 1985 and before November 1, 1986. United States v. Kimberlin, 776 F.2d 1344, 1348 (7th Cir. 1985).

Since the district court's decision in this case was made on June 24, 1985, the amendment is not applicable.

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No. 86-647

In the Supreme Court of the United States

OCTOBER TERM, 1986

ANTHONY LEONARD CUSENZA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
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In the Supreme Court of the United States

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ANTHONY LEONARD CUSENZA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the court of appeals erred in dismissing an appeal from the denial of a motion to reduce sentence under Fed. R. Crim. P. 35(b).

1. On May 20, 1983, petitioner was charged in a 15-count indictment returned in the United States District Court for the Southern District of Illinois. The indictment charged petitioner, along with co-defendants Christopher Goodson and James Strader, with various offenses arising from their participation in a marijuana conspiracy. On August 1, 1983, peti-

tioner pleaded guilty to the charges of conspiring to possess more than 1000 pounds of marijuana with intent to distribute it, in violation of 21 U.S.C. 841 (a)(1) and 846 (Count 1); traveling in interstate commerce to promote an illegal activity, in violation of 18 U.S.C. 1952(a)(3) (Count 5); and using the telephone to facilitate a narcotics transaction, in violation of 21 U.S.C. 843(b) (Count 12). On September 30, 1983, he was sentenced to a total of 12 years' imprisonment on those charges. Pet. App. 2.[1]

On October 11, 1983, petitioner noted an appeal from his guilty plea conviction. On January 4, 1984, while his appeal was pending, petitioner moved under Fed. R. Crim. P. 35(b) for a reduction in his sentence. The district court held the motion in abeyance pending petitioner's appeal. On December 5, 1984, the court of appeals affirmed petitioner's conviction and sentence (749 F.2d 473), and on January 2, 1985, the district court received the mandate affirming its judgment. Pet. App. 2-3.

After receiving the mandate, the district court held a hearing on the Rule 35(b) motion. Petitioner contended that his sentence should be reduced because of the disparity between his sentence and the sentences imposed on his co-defendants, and because of the court's state of mind at the time of sentencing. He also argued that his family was suffering a hardship as a result of his incarceration. The government opposed the motion. On June 24, 1985, 173 days after receiving the mandate, the district court denied the motion on its merits. Petitioner subsequently noted

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[1] Goodson and Strader each pleaded guilty to the same charges. Goodson was sentenced to seven years' imprisonment, and Strader was sentenced to three years' imprisonment.

an appeal from the order denying his Rule 35(b) motion. Pet. App. 3-4.[2]

The court of appeals, relying on its decisions in *Gaertner* v. *United States*, 763 F.2d 787, 790-795 (7th Cir.), cert. denied, No. 85-5384 (Dec. 2, 1985), and *United States* v. *Kajevic*, 711 F.2d 767 (7th Cir. 1983), cert. denied, 464 U.S. 1047 (1984), vacated the district court's order and remanded the case with instructions to dismiss the Rule 35(b) motion for want of jurisdiction. The court of appeals ruled that under the version of Rule 35(b) that was in effect at the time of the district court's order, the district court had jurisdiction over the Rule 35 motion only for a period of 120 days after it received the mandate. Pet. App. 6-8.

2. Although petitioner acknowledges that Rule 35 has been amended since the district court's order was entered and that the new rule does not apply to his case, he contends (Pet. 7-12) that this Court should resolve the conflict among the circuits regarding the interpretation of the prior version of the rule.

Before the 1985 amendment, which became effective on August 1, 1985, Rule 35(b) provided that a court could reduce a sentence within 120 days after imposition of the sentence or within 120 days after affirmance of the judgment by the court of appeals. On its face, the former version of Rule 35(b) strictly limited the time within which a sentence could be reduced to "120 days after receipt by the court of a mandate issued upon affirmance of the judgment."

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[2] Petitioner's notice of appeal was not timely filed, but the court of appeals did not dismiss the appeal on that ground, because the district court had granted petitioner's motion to extend the time for filing the notice of appeal due to excusable neglect (Pet. App. 5-6).

In *United States* v. *Addonizio*, 442 U.S. 178, 189 (1979), this Court stated that that time period was "jurisdictional and may not be extended."

Despite the literal language of former Rule 35(b), most courts of appeals had allowed district judges a reasonable period after the 120 days to rule on a timely filed motion. See *Diggs* v. *United States*, 740 F.2d 239 (3d Cir. 1984); *United States* v. *DeMier*, 671 F.2d 1200 (8th Cir. 1982); *United States* v. *Mendoza*, 581 F.2d 89 (5th Cir. 1978); *United States* v. *Stollings*, 516 F.2d 1287 (4th Cir. 1975). The Seventh Circuit, however, had adhered to the literal language of the rule, concluding that its interpretation was more faithful to the purpose of the rule and to this Court's decision in *Addonizio*. See *Gaertner* v. *United States*, 763 F.2d at 790-797.

Because of the 1985 amendment to Rule 35, the conflict among the circuits as to the interpretation of the prior version of the rule is of no continuing importance. The 1985 amendment added the provision that "[t]he court shall determine the motion within a reasonable time." The Advisory Committee note on the 1985 amendment explains that the change was made to conform the language of the rule "to the nonliteral interpretation which most courts have already placed upon the rule namely, that it suffices that the defendant's motion was made within the 120 days and that the court determines the motion within a reasonable time thereafter." Fed. R. Crim. P. 35 Advisory Committee note (1985 amendment). Thus, the language of the new rule prospectively resolves the question raised by petitioner in this case and makes it unnecessary for this Court to resolve the conflict among the circuits regarding the proper construction of the prior rule.

Moreover, the 1985 revision of Rule 35(b) is only an interim measure. In its April 29, 1985, order amending Rule 35(b), this Court provided that "[t]he amendment to Rule 35(b) shall be effective until November 1, 1986, when Section 215(b) of the Comprehensive Crime Control Act of 1984, Pub. L. 98-473, approved October 12, 1984, 98 Stat. 2015, goes into effect." A subsequent amendment, Pub. L. No. 99-217, § 4, 99 Stat. 1728, postponed the effective date of Section 215(b) until November 1, 1987. When Section 215(b) of the Comprehensive Crime Control Act becomes effective, it will eliminate Rule 35(b) altogether. Therefore, even if the interpretation of the former version of Rule 35(b) had an impact on the current rule, the issue would not warrant this Court's attention, because it would have no effect in any event after November 1987.

Aside from the insignificance of the issue presented in this case, it is clear that petitioner was not prejudiced by the court of appeals' ruling. Even if the court below had addressed the merits of petitioner's claim, it is virtually certain that the order denying petitioner's motion to reduce his sentence would have been affirmed. Petitioner did not seek to correct an illegal sentence, but merely sought discretionary relief.[3] It is well established that a trial court has vast discretion in imposing a sentence within statutory

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[3] While petitioner asserts (Pet. 6) that his sentence was unreasonable compared to the sentences of his co-defendants and was "the result of a biased and emotional state of mind" on the part of the sentencing court, he makes no claim that the sentence was illegal. Neither of petitioner's claims entitles a defendant to reduction of his sentence. See *United States* v. *Taylor*, 768 F.2d 114, 121 (6th Cir. 1985) (subjective intent of the sentencing court insufficient to require a reduction of sentence).

limits. *United States* v. *Grayson*, 438 U.S. 41 (1978). "[O]nce it is determined that a sentence is within the limitations set forth in the statute under which it is imposed, appellate review is at an end." *Dorszynski* v. *United States*, 418 U.S. 424, 431 (1974). Consequently, appellate review of a legal sentence almost invariably results in affirmance, particularly when the appellate court is reviewing the sentencing court's exercise of its discretion under Rule 35(b). See 3 C. Wright, *Federal Practice and Procedure: Criminal 2d* § 588, at 415-416 (2d ed. 1982). As the court noted in *Diggs* v. *United States*, 740 F.2d 239, 249 (3d Cir. 1984), "[t]he concept of 'error' has little meaning when applied to motions for relief under rule 35(b). Such motions are addressed entirely to the discretion of the district judge; the judge can deny such motions for virtually any reason or for no reason at all." See also *United States* v. *Ames*, 743 F.2d 46, 48 (1st Cir. 1984), cert. denied, 469 U.S. 1165 (1985); *United States* v. *Campbell*, 711 F.2d 159, 160 (11th Cir. 1983). Accordingly, even if the court of appeals had addressed the merits of petitioner's claim, the opportunity for appellate review would not have resulted in a change in his sentence. That is especially true where, as in this case, petitioner challenged his sentence on direct appeal and the court of appeals rejected his challenge on the merits at that time. See *United States* v. *Cusenza*, 749 F.2d 473, 477-480 (7th Cir. 1984).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

DECEMBER 1986

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